

CHAPTER 4-12-09
LIMITED COMPETITION, NONCOMPETITIVE, AND EMERGENCY
PROCUREMENTS

Section

4-12-09-01	Competition May Be Waived or Limited
4-12-09-02	Limited Competitive Procurements
4-12-09-03	Noncompetitive Procurements
4-12-09-04	Emergency Procurements

4-12-09-01. Competition may be waived or limited.

1. A purchasing agency may request to limit or waive competitive solicitation requirements pursuant to North Dakota Century Code section 54-44.4-05.
2. Competition may not be limited or waived to satisfy preferences or for the convenience of the purchasing agency.
3. Circumstances under which a deviation from procurement procedures to limit or waive competition and procure through negotiations is appropriate pursuant to subsection 2 of North Dakota Century Code section 54-44.4-05, without a written determination, include:
 - a. Contracts for legal services, subject to the requirements of North Dakota Century Code section 54-12-08;
 - b. Contracts for professional witnesses to provide for professional services or testimony related to existing or probable lawsuits in which the state may become a party;
 - c. Contracts for temporary administrative law judges pursuant to North Dakota Century Code section 54-57-02;
 - d. Contracts for medical doctors, dentists, psychologists, and other medical specialists;
 - e. Purchases of books, newspapers, magazine subscriptions, and periodicals;
 - f. Prerecorded audiovisual materials, including records, tapes, cassettes, compact disks, slides, transparencies, films, and videotapes;
 - g. Purchases of materials required for manufacturing and production by a purchasing agency engaged in manufacturing and production operations;

- h. When immediate expenditures are necessary to ensure the integrity of state records;
 - i. Purchases of livestock, fish, insects, and other animals;
 - j. Commodities for resale at state-operated concessions;
 - k. Purchases of items with cultural, historical, or archaeological significance for museums or archival purposes;
 - l. Purchases of works of art;
 - m. Contracts for residential and treatment services to ensure continuity of client care and vocational rehabilitation commodities for clients of the department of human services;
 - n. Contracts for performers, entertainers, and guest speakers, excluding contracts for education, instruction, or training; and
 - o. Medications, pharmaceuticals, metabolic foods, food supplements, food replacements, vitamins, and therapeutics, as prescribed by health care professionals for patients of a state facility or clients of a state program.
4. A prior written determination is required for all other requests for limited competitive and noncompetitive purchases subject to the provisions of this chapter and the terms of the purchasing agency's delegated purchasing authority.

History: Effective August 1, 2004.

General Authority: NDCC 54-44.4-04

Law Implemented: NDCC 54-44.4-02.1, 54-44.4-04, 54-44.4-05

4-12-09-02. Limited competitive procurements.

1. Competition may be limited pursuant to North Dakota Century Code section 54-44.4-05 under circumstances in which the deviation from the procurement procedures to limit competition is determined to be appropriate, including:
 - a. When products or services exclusive to particular individuals or business entities are required and competition for the proprietary product or service exists;
 - b. When circumstances require that commodities or services be provided by bidders or offerors within a specific geographic area, such as equipment requiring local service, onsite service within a specific time, or delivery of readymix concrete; or

- c. When it is determined that a competitive sealed bid or competitive sealed process is impracticable or not in the best interest of the state.
2. Whenever limited competitive procurements are to be made, a written determination will be attached to the procurement file. The determination must be accompanied by a written explanation as to why the competition should be limited and why a fully competitive procurement method is impracticable or not in the best interest of the state. The purchasing agency must provide evidence necessary for an independent examination and determination of the material facts of the procurement.
3. The purchasing agency will approve noncompetitive procurements within its delegated authority.
4. When the procurement is outside the scope of the agency's delegated authority, prior written approval of the state procurement manager or designee must be obtained.
5. The purchasing agency may issue a notice of intent to make a limited competitive purchase to determine if other sources are available.
6. The purchasing agency shall obtain the level of competition practicable.

History: Effective August 1, 2004.

General Authority: NDCC 54-44.4-04

Law Implemented: NDCC 54-44.4-04, 54-44.4-05

4-12-09-03. Noncompetitive procurements.

1. Competition may be waived pursuant to North Dakota Century Code section 54-44.4-05 under circumstances in which the requirements are a sole source or can only be met by a specific commodity or service exclusive to a particular individual or business entity to the exclusion of competing vendors, commodities, or services.
2. A noncompetitive procurement is not justified on the basis of any of the following circumstances:
 - a. The lack of adequate advance planning for the procurement of the required commodities or services;
 - b. Delays in the procurement caused by administrative delays, lack of sufficient procurement personnel, or improper handling of procurement requests or competitive procedures; or
 - c. Pending expiration of budget authority.

3. Whenever noncompetitive procurements are to be made, a written determination will be attached to the procurement file. The determination must be accompanied by a written explanation as to why it is not practicable to award a contract by a competitive procurement method and why a noncompetitive procurement is in the best interest of the state. The purchasing agency must provide evidence necessary for an independent examination and determination of the material facts of the procurement.
4. The purchasing agency will approve noncompetitive procurements within its delegated authority.
5. When the procurement is outside the scope of the agency's delegated authority, prior written approval of the state procurement manager or designee must be obtained.
6. The purchasing agency may issue a notice of intent to make a noncompetitive award to determine if such an award is appropriate.
7. The procurement officer shall conduct negotiations, as appropriate, regarding price, delivery, and terms. Such negotiations must be conducted in accordance with chapter 4-12-12.
8. The procurement officer responsible for the noncompetitive procurement shall prepare and retain in the procurement file a record of the noncompetitive procurement that includes the written determination, contractor's name, description of the commodities or services procured, and contract amount.

History: Effective August 1, 2004.

General Authority: NDCC 54-44.4-04

Law Implemented: NDCC 54-44.4-04, 54-44.4-05

4-12-09-04. Emergency procurements.

1. Procurements may be made under emergency conditions in a circumstance when there is insufficient time for usual competitive procurement methods and which involve public health, public safety, or when immediate expenditures are necessary pursuant to North Dakota Century Code section 54-44.4-02. If the circumstance does not meet the provisions of North Dakota Century Code section 54-44.4-02, a limited competitive determination must be made.
2. An emergency procurement need not be made through competitive sealed bidding or competitive sealed proposals but shall be made with competition that is practicable under the circumstances.

3. The purchasing agency shall limit the quantity of commodities or services being purchased to that necessary to meet the emergency circumstance.
4. The purchasing agency must prepare a written determination for the use of emergency procurement procedures, including an explanation as to why emergency conditions exist, a description of the required commodities or services, and evidence necessary for the independent examination and determination of the material facts of the procurement.
5. The responsible agency official must promptly forward the emergency determination to the state procurement office after the procurement.
6. The procurement officer shall conduct negotiations, as appropriate, regarding price, delivery, and terms. Such negotiations must be conducted in accordance with chapter 4-12-12.
7. The procurement officer responsible for the emergency procurement shall prepare and retain in the procurement file a record of the emergency procurement that includes the emergency determination, description of the commodities or services procured, and basis for the selection of the vendor.

History: Effective August 1, 2004.

General Authority: NDCC 54-44.4-02, 54-44.4-04

Law Implemented: NDCC 54-44.4-02, 54-44.4-04